

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

GARRY A. WILL,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-023

ORDER GRANTING
PARTIAL SUMMARY JUDGMENT

This matter comes before the Board on Respondent Department of Ecology's (Ecology) Motion for Partial Summary Judgment. Board members Bill Clarke, Chair, and William H. Lynch, member, deliberated on the motion. Administrative Law Judge Cassandra Noble presided for the Board. The Board has reviewed and considered the pleadings and other motion papers contained in the Board record, including the following:

1. Ecology's Motion for Partial Summary Judgment;
2. Declaration of Sarah Bendersky in Support of Respondent's Motion for Partial Summary Judgment and exhibits 1, 2 and 3;
3. Appellant's Response Opposing Respondent's Motion for Partial Summary Judgment and appendices A and B;
4. Declaration of Garry Will, August 9, 2005;
5. Respondent's Reply to Appellant's Response Opposing Respondent's Motion for Partial Summary Judgment; and

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6. Declaration of Bob Barwin in Support of Respondent's Reply to Appellant's Reply to Appellant's Response Opposing Respondent's Motion for Partial Summary Judgment, August 18, 2005 and Exhibits 1, 2 and 3.

The parties submitted this matter to the Board for its consideration on the written record without oral argument. Accordingly, based on its review of the foregoing documents, the Board enters the following order:

BACKGROUND

Appellant challenges Ecology's decisions on two water right change applications issued in January 2005. The Appellant claims that Ecology's approval of Application Nos. CS4-ADJ38VOL5-GP42 and G4-10221P and for the change of two water rights improperly subjects the changes to all senior water rights. He denies that the wells involved were either in continuity with or interfered with any senior water rights. Appellant's Response Opposing Respondent's Motion for Partial Summary Judgment.

Ecology has moved for partial summary judgment on issues 1(a) and 1(b), arguing that this Board has no jurisdiction over a Stipulation and Agreed Order entered into by the parties in 1984 in an earlier case before this Board, PCHB 82-205. Ecology argues that, because it lacks jurisdiction, the Board may not require Ecology to adhere to the terms of the 1984 agreement with regard to the identification of surveys, investigations and studies appropriate to develop sufficient information on the groundwater-surface water interaction at the site.

This case follows settlement of a previous dispute over twenty years ago. Will and Ecology entered into a Stipulation and Agreed Order, signed on October 3, 1984, settling PCHB

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1 82-205. At that time, Ecology agreed to issue a preliminary permit in the amount of 300 gallons
2 per minute upon the Appellant's water rights application and also that it would provide Appellant
3 with data then held by the Department in its files, including information gathered after a pump
4 test on the elevation of well collars and stream beds. Appellant claims that Ecology did not meet
5 its obligations as specified in the Stipulation and, because of that, he was denied the opportunity
6 to acquire adequate water rights. With regard to the change application that is the subject of this
7 appeal, the Appellant asserts that Ecology was required to comply with what he asserts are its
8 unfulfilled contractual commitments to him prior to issuing the current change application
9 approval. He states that Ecology should have issued a preliminary permit for 300 gallons/minute
10 of new water right and worked with him to develop necessary information on the ground
11 water/surface water interaction at the site.

12 After the settlement, Appellant did not apply for the changes in his water rights until
13 1993, nine years after his agreement with Ecology. Ecology states that, had Appellant submitted
14 his application in 1984 (when the agreement was made), Ecology would have issued a
15 preliminary permit and gathered data on the ground water - surface water interaction at
16 Appellant's site, as was Ecology's practice at the time. But by 1993, Ecology had already
17 gathered sufficient knowledge of the interactions between ground water and surface water
18 interactions in the Okanogan Valley to meet its responsibility to make the four required statutory
19 findings prior to its permit decision on this application. "Combining what Ecology knew about
20 stream and ground water interactions in the Chelan and Okanogan areas with water right case
21 law relating to hydraulic continuity that evolved through the late 1980s and early 1990s, a

appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), *rev. denied*, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed in favor of the nonmoving party as they have been in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

The issues in this case are as follows:

1. Whether the PCHB has jurisdiction over the Stipulation and Agreed Order entered into by the parties in PCHB No. 82-205?
 - (a) If the Board has jurisdiction over that Stipulation and Agreed Order, is Ecology required to adhere to that order and to issue a preliminary permit in the amount of 300 gpm in connection with Application CG4-10221 (Permit No. G4-10221P)?
 - (b) If the Board has jurisdiction over that stipulation and Agreed Order, is Ecology required to adhere to that order and to identify surveys, investigations and studies appropriate to “develop sufficient information on the groundwater-surface water interaction of the site”?
2. Whether Ecology made a determination regarding ground water-surface water interaction when it reviewed the requested changes to permit No. G4-10221P?
3. Whether Ecology has the authority, when approving the requested changes to permit No. G4-10221P, to condition that the changes be subject to existing rights?

1 Ecology moved for partial summary judgment on issues 1(a) and (b). Ecology argues
2 that the authority in RCW 43.21B.110 and WAC 371-08-315(2) provides no jurisdiction over a
3 stipulation and agreed order where the Board dismissed the relevant appeal years earlier, and,
4 particularly, no jurisdiction over what is essentially a contract dispute.

5 The Appellant argues that, because the previous agreement with Ecology was not
6 fulfilled, Ecology's failure to complete the specific actions set forth in the Stipulation is relevant
7 to his challenge of Ecology's decision as to the current water right applications. Thus, he argues,
8 the Board does have jurisdiction to decide whether Ecology complied with the Stipulation and
9 whether, under these circumstances, Ecology's decision on the current application was lawful.
10 Appellant describes the central issue in this case as follows: "...the question is whether Ecology
11 is required to adhere to its contract with [the Appellant] pursuant to which it agreed to issue a
12 preliminary permit for the right to withdraw an additional 300 gallons per minute of a new water
13 right and to work with [Appellant] in developing sufficient information on the ground water -
14 surface water interaction at the site before issuing the order on appeal." Appellant's Response
15 Opposing Respondent's Motion for Partial Summary Judgment, p. 2. Appellant ties his
16 contractual agreement with Ecology in settlement of the earlier case to the application that
17 resulted in the current appeal. He asserts that, by making the agreement, Ecology acknowledged
18 that it did not have sufficient information to support its denial of Appellant's original application.
19 He also questions whether Ecology had the necessary information when it made the decision on
20 his current application.

1 With regard to the scope of the Board’s jurisdiction, RCW 43.21B.110 lists the kinds of
2 decisions that can be appealed to this Board. They include certain decisions of Ecology, local
3 conservation districts, air pollution control boards or authorities, and local health departments.
4 The Board’s authority does not include claims and disputes between individuals over contracts.
5 In 1993, the Washington Supreme Court reiterated the principle that agencies are strictly bound
6 by their statutory authority:

7 The resolution of this case turns on fundamental rule of administrative law—an
8 agency may only do that which it is authorized to do by the Legislature. *In re*
9 *Puget Sound Pilots Ass’n*, 63 Wash.2d 142, 146 n.3, 385 P.2d 711 (1963); *Neah*
10 *Bay Chamber of Commerce v. Department of Fisheries*, 119 Wash.2d 464, 469,
11 832 P.2d 1310 (1992). The Administrative Procedure Act of 1988 (APA), RCW
12 34.05, specifically provides that a court “shall grant relief from an agency
13 order...if it determines that ...[t]he order is outside the statutory authority or
14 jurisdiction of the agency conferred by any provision of law”. RCW
15 34.05.570(3)(b).
16 *Rettkowski v. Department of Ecology et al.*, 122 Wn.2d 219, 226, 858 P.2d 232 (1993).

17 Although the issues in PCHB 82-205 concerned Ecology’s reasons for denial
18 (interference with existing and claimed senior water rights), that case was dismissed at the
19 parties’ request. Therefore, the Board no longer has jurisdiction over the issues in that case. If a
20 claim is based on actions outside the review authority of this Board, it must be dismissed as a
21 matter of law. The Board lacks the authority to decide the Appellant’s contract claim against
Ecology and therefore issues 1(a) and (b) must be dismissed to the extent that they present
contract questions.

However, Issues 1(a) and (b) do also suggest factual questions that could have relevance
to the resolution of the remaining issues. Issue 1(a) concerns Ecology’s non-issuance of a

1 preliminary permit in the amount of 300 gpm. Ecology's statement that it had sufficient
2 information and did not need to issue a preliminary permit is a fact that remains disputed. Issue
3 1(b) concerns the sufficiency of the information on the groundwater-surface water interaction of
4 the site. Issue 2 relates to whether Ecology made a determination regarding ground water-
5 surface water interaction, and Issue 3 concerns the subjugation of the Appellant's water rights to
6 existing rights. Ecology has moved for summary judgment on the basis that the Board lacks
7 jurisdiction to consider whether Ecology failed to perform its contractual obligations. The Board
8 agrees that it lacks jurisdiction over contract disputes, even when they arise in the context of a
9 case before the Pollution Control Hearings Board. However, the factual questions raised within
10 Issues 1(a) and (b) should survive the granting of partial summary judgment as they may have
11 relevance to the resolution of Issues 2 and 3. Summary Judgment is appropriate where there are
12 no genuine issues of material fact and the moving party is entitled to judgment as a matter of
13 law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1977).
14 [CITE] A material fact in a summary judgment proceeding is one that will affect the outcome
15 under the governing law. *Eriks v. Denver*, 64 Wn.App. 128, 822 P.2d 1257 (1992). [CITE] The
16 trier of fact must construe the evidence and consider the material facts and all reasonable
17 inferences therefrom in the light most favorable to the nonmoving party. *Weatherbee v.*
18 *Gustafson*, 64 Wn.App. 128, 822 P.2d 1257 (1992). [CITE] In connection with his response to
19 the Motion for Partial Summary Judgment, Appellant submitted a declaration and documents
20 that concern the events and communications relating to the earlier application. These factual
21 matters may also have possible relevance to the current application. Viewing this evidence in the

1 light most favorable to the Appellant, the Board concludes that, although summary judgment is
2 appropriate as to the legal issue of its jurisdiction over the question of whether the contract was
3 fulfilled, that determination should not preclude Appellant from producing evidence about the
4 bases for and information supporting Ecology's decision on the current application. To the
5 extent that such evidence addresses Issues 2 and 3, it should be allowed.

6 **ORDER**

7 In accordance with the analysis above, Respondent Department of Ecology's Motion for
8 Partial Summary Judgment as to issues 1, 1(a) and 1(b) is granted, but Appellant is not precluded
9 by this Judgment from presenting evidence that is relevant to the factual bases for Ecology's
10 decision on Appellant's application that is the subject of this appeal.

11 DONE this 30th day of September 2005.

12 **POLLUTION CONTROL HEARINGS BOARD**

13 **BILL CLARKE, CHAIR**

14 **WILLIAM H. LYNCH, MEMBER**

15 **CASSANDRA NOBLE**
16 Administrative Appeals Judge, Presiding
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